Supreme Court of the United States

OCTOBER TERM, 1901.

DUGALD WOODBURN, SARAH D. BROWN and GEORGE N. DEAFTON, *Plaintiffs in Error and Appellants,*

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Defendant in Error and Appellee.*

No. 208.

ON A CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

JOHN N. BALDWIN,
Counsel for Plaintiffs in Error and Appellants.

Omaha Printing Co.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

LUCIAN WOODWORTH, FRANK D BROWN AND GEORGE N. CLAYTON, *Plaintiffs in Error and Appellants,*

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Defendant in Error and Appellee.*

No. 222.

ON A CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

I.

The position of the Supreme Court of Nebraska on the question as to when the title passes and the right to rents and profits accrues, is established beyond question to be when the *sheriff's deed is made*, by the cases cited in the argument for appellant. Relying on the case of *Clark vs. Way*, 52 Neb., 204, of which the Court itself says in the opinion, "We eliminate the minor and less material

points, in the hope that the case may be so far simplified as to render its condition intelligible," appellee attempts by using language applicable to the peculiar conditions of this case to establish a proposition entirely at variance with the law as clearly laid down by an unbroken line of cases, decided since the *Clark vs. Way* case, (supra), and which are all found cited in the brief for plaintiffs in error. And the doctrine thus laid down in all these cases is clearly in accordance with all the well established legal principles with reference to the transfer of titles in lands.

In all the cases cited in our original brief, the Supreme Court of Nebraska has repeated and reiterated the statement that no title passes to the purchaser until the deed is made in pursuance of the sale.

In *Orr vs. Broad*, 52 Neb., 490, the court said:

"The plaintiff who purchased at the execution sale, by the confirmation thereof *and the deed made pursuant thereto*, was vested with such title and right as were in the judgment, debtor at the time the lien of the judgment attached to the land."

And again, on page 498, the court said:

"Accompanying the legal title and right to possession, the right to the rents and profits passed to the plaintiff; hence, from the date, November 19, 1891, the date of the confirmation of the execution sale and *deed of the sheriff to the plaintiff*, the legal title was in him, he had the right of possession and to collect the rents and profits of the real estate."

And again, in the latest announcement on this subject, *Clark vs. Trust Co.*, 59 Neb., 53, the court again approves of the language and doctrine laid down in *Orr vs.*

Broad, and quotes from that opinion the exact language above quoted from page 498.

The title passes when the deed is executed and delivered. The confirmation of the sale is but one of the steps in the transfer of the title, just as is the foreclosure of the mortgage and the sale under the decree. If the confirmation of the sale passes the title, where is the necessity for the deed?

It certainly would not be claimed that after title has passed, redemption could be made, and yet it has been distinctly held that during the pendency of an appeal from the order of confirmation and until the affirmance of the order of the lower Court, redemption can be made.

Co. vs. Gustus, 55 Neb., 435.

Neither by citation of authorities nor by argument has appellee shaken the position taken by the Supreme Court of Nebraska in the unbroken line of cases following *Orr vs. Broad*, 52 Neb., 490, and all decided long since the uncertain language as found in the *Clark vs. Way* case was used, and it must be conceded as the established law of the State of Nebraska that no title nor right to the rents and profits passes until the execution and delivery of the Master's deed, following the order of confirmation. To hold otherwise would take away one of the substantial rights of the mortgagor and put a penalty upon his right to appeal from the order of confirmation, which the law unmistakably gives him. In addition, outside of the law as found in Nebraska, we have cited in the last pages of

our original brief a line of authorities which establish the proposition beyond question that the title does not vest in the mortgagee, nor is the mortgagor's title divested, *until the deed is delivered.*

Counsel for appellee attempts to distinguish the New York cases cited from the case at bar because the Master's report of sale in foreclosure suits followed the execution and delivery of the deed. This of course could make no difference in the principle laid down by the cases and only strengthens the force of our argument that it is the execution and delivery of the deed by the Master which transfers the title and the right to the rents and profits, rather than any other step in the foreclosure proceedings. The deed in this case never having been executed or delivered and an appeal being taken from the order of confirmation, there never was in appellee any title to the property in question, and consequently there could be in him no right to any rents or profits that may have accrued upon the premises before the execution to him of the Master's deed.

II.

As to the scope and effect of the supersedeas bond, it must be apparent from a study of the cases cited by appellant that the bond never contemplated damages for rents and profits, even though it be conceded that the defendant in the case would be liable therefor. Judgment has been entered in this action against the principal and the sureties on this bond, which is clearly erroneous. In support of the contention that obligees of the bond would be so liable, appellee cites cases in ejectment, where an entirely different principle prevails.

There the plaintiff depends upon *title* as the foundation of his action. He is successful and the title is found to be in him. An appeal is taken and the bond might be said to contemplate (though this has been questioned) the damages he will suffer by being longer deprived of his property. But in the case at bar he has never held any title. He is merely setting in motion the machinery of the law under which, if successful, he hopes to establish a title for himself. So in such a case the bond could only contemplate such damages as are ordinarily incident to a suit of this nature. This distinction is clearly established in the Kountze case and the other cases cited in appellant's brief.

Even if it should be determined that the mortgagor is liable for the rents, issues, and profits pending an appeal from an order of sale or confirmation and before delivery of deed, it should never be held that such rents

could be recovered in an action upon a supersedeas bond. An independent action of some kind or character should be brought by the purchaser at the sale or the person entitled to the rents. No Federal Court has ever held that rents were recoverable as part of the damages for breach of the obligations of a supersedeas bond. The mortgagee or purchaser at the sale had ample and adequate legal remedies and could have protected their interests if they were affected or in jeopardy. If waste was about to be committed, impairing the security, they could have procured an injunction. If the security was inadequate, they could have had a Receiver appointed to take charge of the rents. Other proceedings, suits, or actions could have been instituted, but none was begun, brought, or adopted, and we submit that this Court should not extend the terms, obligations, or lawful purpose of a supersedeas bond to give, for their convenience, still another remedy.

Respectfully submitted,

JOHN N. BALDWIN,

Counsel for Plaintiffs in Error and Appellants.